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THE BOARD OF CONTRACT ADJUSTMENT OF THE WAR DEPARTMENT.*

1. CONTRACT SETTLEMENT ORGANIZATIONS OF THE WAR DEPARTMENT.

WHEN the Armistice was signed, the War Department found itself obligated upon a large number of contracts, formal and informal, which it had negotiated for military supplies. Many of these contracts were in the process of performance. To have continued production under them would have meant an improvident waste not only of Government funds but of materials and labor, which were urgently needed in the reconstruction of industry upon a peace-time basis.

The problem at once arose of curtailing production under the contracts of the War Department in a manner which would satisfy the revised military needs, and, at the same time, convert the industrial machinery as smoothly as possible to the commercial needs of the Nation.

Boards were at once set up in each of the bureaus of the War Department to review the outstanding contracts that had been negotiated therein, and to determine upon the methods and the extent of the curtailment that was necessary. Two courses were open. The Government could notify the contractor that it would refuse to receive any articles manufactured under the outstanding contracts in excess of the revised requirements. Such a course would constitute a breach of contract and cast the burden of adjustment of any rights which the contractor might have, both for expenditures made in preparation for the curtailed portion of the contract and for anticipated profits under the original contract, into the Court of Claims. It would also have resulted in widespread industrial

*This article has been prepared at the special request of the Editor of the VIRGINIA LAW REVIEW, and in its preparation I have drawn so largely upon the accurate notes of Col. John Ross Delafield, Chairman of the Board of Contract Adjustment, that it possesses little originality. I can only say that I have plagiarized with his consent.

hardship, and would have involved a wholesale repudiation of obligations which the Government could not seriously contemplate.

The other course was to attempt to negotiate amendments to the existing contracts which would provide for the desired curtailment of production, and, at the same time, reimburse and remunerate the contractor on a fair basis for those preparations which he had made for the performance of the original contract. The negotiation of these amended or supplemental contracts was naturally a function of the same bureaus which had negotiated the original contracts. The boards in the various bureaus which had been charged with the duty of determining what curtailment of production was desirable were, therefore, further charged with negotiating the amended contracts.

It was desired that this work be approached by both contractors and bureaus with the same spirit of coöperation which had animated the Department and contractors in the making and execution of the original contracts, so that this final chapter of the war-time relations of industry with the Government would be animated by the same fine spirit which had characterized those relations to such a prevalent degree during the strenuous days of hostilities. It was deemed important that the work of negotiation of these new contracts be carried on while those who were familiar with the history of the making and production under the contracts were still in the service, and to this end officers and civilians who had been engaged in the work of procurement, production and inspection directed their energies toward working out a sound and fair basis for supplemental contractors curtailing production.

These contracts or statutory awards are executed, the former by the contracting officer and the claimant, and the latter by the District Board and the claimant, but they are by their terms expressly subject to the approval of the Bureau Boards and in the case of statutory awards also by the War Department Claims Board hereafter described. The entire record is thereafter transmitted to the Bureau Board which in turn reviews the whole settlement on the record including computations, valuations or appraisements, thus determining whether all the reg-

ulations of the War Department and the Comptroller and the law have been followed, etc. It may then approve or disapprove the settlement. If it approves, then the record is filed and the Settlement Contracts or Statutory Awards, after execution, are sent to the District Board, one to the claimant, another to the Disbursing Officer, another to the Auditor for the War Department, and in case of Settlement Contracts, one to the Returns Office. If disapproved, it is returned to the District Office in order that it may be corrected and an endeavor made to negotiate and arrive at a new settlement with the claimant, or the Bureau Board may itself undertake the negotiation. There are also provisions and special forms for making partial payments to claimants before the final adjustment, either on items of claim proved or on a percentage of the estimated minimum total award less debts due the United States. These forms and papers for partial payments are usually accomplished in the Districts without reference to the Bureau Boards for approval, and this is permitted because the whole settlement, including the partial payments and the items on which they are based, are ultimately sent to the Bureau Board in any event, for review on payment of the final amount and the execution of the final settlement contract.

Some of the Bureaus have established special boards to operate on claims on certain groups of contracts, as for example the Nitrates Board of the Ordnance Department. These function as District Boards.

The Bureaus with more limited numbers of contracts do not generally operate through district organizations. The Bureau Board itself in such cases conducts the whole investigation and negotiation, and makes the award and settlement contract subject to the approval of, or, if a statutory award, execution by, the War Department Claims Board member assigned to that Bureau.

Where for any reason an agreement cannot be reached by the District within the limits of the regulations, the case goes first on appeal to the Bureau Board, and if no agreement is reached there, then on further appeal to the Board of Contract Adjustment.

The boards which were charged with the duty of determining what curtailment of production was desirable, in negotiating contracts for such curtailment, came generally to be known as "Claims Boards." One such board was set up in each bureau. The Ordnance Department Claims Board was established as early as November 6, 1918. In certain of the bureaus, as in the Office of the Director of Purchase, and in Ordnance, it was necessary, if this were to be done efficiently, to further decentralize their activities; and in these bureaus, the bureau claims board became a reviewing board, while the actual negotiations for the new contracts were carried on in the case of Ordnance by claims boards established on November 26, 1918, in each of the Ordnance Districts into which the country was divided; and in the case of Purchase, by claims boards in each of the Supply Zones into which the country was divided. Of these District Boards, the District Chief or Zone Supply Officer was made chairman; a prominent business man of the district was generally made a member of the Board, and to it was attached a lawyer. The existing personnel in the District or Zone was coördinated to assist in the work. This personnel had been engaged during the war in activities of inspection, accounting, finance, expediting production, etc., and contained the best available material to check and examine the statements submitted by the contractors on prescribed forms, as to the expenditures and commitments which they had made in preparation for the curtailed portion of the contract, and the other elements which they claimed ought to be taken into consideration in the negotiation of the new contract with them providing for the curtailment of their production. This personnel was formed into groups under the leadership of officers or civilians designated by the Chairman of the Board, and these heads with their principal assistants, are usually known as the "staff."

The District or Zone Board, or the Bureau Claims Board in those bureaus where there are no local boards, makes a complete determination as to the facts stated by the contractor and embodies its findings in a condensed statement, generally on a prescribed form, known as an "award." This award, when assented to by the contractor, becomes the basis for the settle-

ment or supplemental contract; or, where the contract is not executed in the manner prescribed by law, for the statutory award under the Act of March 2, 1919.

Reference has been made above to the War Department Claims Board. This Board acts under the presidency of the Assistant Secretary of War, who, as Director of Munitions, has supervision and direction of the whole supply system of the Army and consequently of all contracts and questions relating thereto. This Board was given, by Circular No. 26 of the War Department, dated January 20, 1919, power "to supervise and coördinate the work of the various War Department agencies engaged in the settlement of claims resulting from the termination of contracts or other procurement obligations of the Department consequent upon the suspension of hostilities and to authorize and approve such settlements." All settlement contracts negotiated by the bureaus, before they can become effective, must be approved by this Board or by one of its members designated for the purpose. Upon the passage of the Dent Act, the powers of the Secretary of War to adjust, pay and discharge the agreements covered by that Act, so far as they related to contracts made in the United States and Canada, were delegated to the War Department Claims Board by General Order No. 40 of March 19, 1919, and all statutory awards made under this Act are made in its name by the Board or by one of its members authorized for that purpose. The actual consideration of settlement contracts and the making of statutory awards are, except in special cases, carried on by specially designated members of the Board, who sit with the Bureau Claims Boards, the Board, as a whole, confining itself ordinarily to the determination of questions of policy and the supervision of the administration of various agencies of the Department engaged in contract settlement work.

In administering its powers under the Dent Act, the War Department Claims Board makes use of the bureau and local boards in negotiation of proposed statutory awards and has also delegated important parts of its jurisdiction to the Board of Contract Adjustment.

The Board of Contract Adjustment was organized on No-

vember 6, 1918 in order to meet requirements for a board that would perform the functions provided for in the standard form of contract, required by Supply Circular 88, 1918, in the determination of questions of doubt and of other incidental questions arising during the performance of contracts. It was intended that this Board should relieve the Secretary of War of the determination of many perplexing questions which would otherwise be submitted to him. It was planned to have it composed of men drawn from civil life, of high standing in their communities, whose views would command the confidence of contractors, and make them feel that their rights under their contracts were being considered in a broad and business-like fashion by men who had been accustomed to deal with similar important questions in civil life.

After the Armistice, when the work of negotiating new contracts was imposed upon the Department, it was immediately felt that the Board of Contract Adjustment would be a useful agency in passing upon the terms of proposed supplemental contracts, where the negotiating bureaus and the contractor could not come to an agreement as to the terms of a new contract. Consequently, it was provided that, where the Bureau Board and the contractor are unable to come to an agreement, the contractor may appeal to the Board of Contract Adjustment for a review of the proposed terms of the settlement contract. If the Board of Contract Adjustment is in agreement with the views of the Bureau Board, and its position is sustained by the Secretary of War on a submission to him for review, then unless the contractor is willing to make an adjustment upon that basis, the original contract is breached and the contractor relegated to his rights in the Court of Claims. In the event that the Board of Contract Adjustment finds that a supplemental contract ought to be made on terms other than those proposed by the Bureau Board and objected to by the contractor, the matter is sent back to the Bureau Board for the making of a supplemental contract along the lines outlined by the Board of Contract Adjustment.

A similar appellate jurisdiction from the action of the Bureau Boards with reference to Dent Law Awards was delegated to

the Board of Contract Adjustment by the War Department Claims Board, and it was also given an extensive original jurisdiction under the Act which will presently be described.

The other principal board of the War Department for the settlement of claims is the War Department Board of Appraisers, constituted by General Order No. 30, of April, 1918. This Board has the function of determining amounts due for property commandeered or requisitioned under the National Defense Act of June 3rd, 1916, Section 120, and the Food Control Act of August 10, 1917, Section 10, and may also, by award in advance, fix the amounts to be paid for work and property received under compulsory orders under the same acts. To it are referred also claims relating to real estate under the Act of March 2nd, 1919.

In settling the claims of contractors, it usually becomes necessary for the District or Bureau Board also to take part in or check up the settlements made by the prime contractor with his subcontractors. This involves a great number of determinations by District Boards generally greatly exceeding in number the prime contract settlements. However, as these subcontractors have no contractual relations with the United States, the basis for such settlements is not so prescribed, and the approval of these settlements by the Bureau Boards is not required. Such subcontract settlements may be approved by the District Boards where they are within the limits of the amount which the subcontractor would recover from the prime contractor in an action or suit in court.

An idea of the work performed by all these Boards and the many thousands of officers and men and women they employ may be gained from the fact that about 21,800 War Department contracts had been settled by them up to August 31st, 1919, for an aggregate sum of about \$272,786,000, and that an estimated number of about 5000 claims amounting to about \$300,000,000 then remained to be settled. The settlements above made were at an average of 13% of the amount which the United States would have been obligated to pay had the then unperformed parts of the contracts been completed. Other claims to a limited number coming before the Board of Con-

tract Adjustment under the Act of March 2nd, based on agreements made by officers or others acting under the authority of the President, are not here included.

2. THE BOARD OF CONTRACT ADJUSTMENT.

Of the various boards described the one of particular interest to the legal profession is the Board of Contract Adjustment.

The first Chairman of the Board of Contract Adjustment was a Virginian—Col. Christopher C. Garnett—one time Assistant Attorney-General and later Chairman of the Corporation Commission of Virginia. The task of organizing and putting into operation the Board fell to him. He did his work with characteristic efficiency.

For sometime the Board possessed a limited membership and was inadequate in size to the tremendous task before it. Recently Col. Garnett, who resumed the private practice of the law in Washington, was succeeded by Col. John Ross Delafield, Ordnance Department, a distinguished member of the New York Bar. The membership of the Board has now been increased to 18, with a Staff of Legal Examiners, numbering over 80, including officers of the Army and civilian lawyers.

Eleven of the members of the Board are at present civilian lawyers, including: the Hon. John Garland Pollard of Virginia, Hon. Howard R. Bayne of New York, Mr. George S. Shirk of New York, Mr. Edward L. Patterson of New York, Mr. Theodore Eaton of Massachusetts, Mr. Lincoln Bryant of Massachusetts, Mr. Henry T. Hunt of Ohio, Mr. Charles W. McCandless of New York, Mr. Wirt Howe of New York and Col. Jennings C. Wise of Virginia. The other members are, with the exception of Col. T. C. Boggs, all lawyers by profession and temporary officers of the Army, and are: Lt. Col. Ashby Williams of Virginia, Lt. Col. Francis T. A. Junkins of Illinois and Virginia, Lt. Col. Geo. L. McKeeby, Lt. Col. Rob. H. Carruth and Major Robert L. Henry, Jr.

The salary of the civilian examiners is \$4,500 and of the civilian members of the Board \$7,500 per annum, while the military members receive the pay of their offices.

The Board sits at hearings in committees of three, the per-

sonnel and chairman of the committees being changed weekly and the members rotating as chairman. The examiners prepare the cases and represent the Government at the hearings, at which the claimant is encouraged to be represented by counsel. The chairman of the hearing committee writes the opinion, which, when concurred in by the other members of the committee and the Chairman of the whole Board, is referred to the proper bureau for the final settlement of the case.

Petitions for a rehearing are entertained by the Board, and on questions involving a disagreement in a committee the whole Board is called upon to consider the case.

The jurisdiction of the Board of Contract Adjustment is limited to that of the Secretary of War, a discussion of which at this point becomes necessary since it is not generally understood in the profession.

3. THE JURISDICTION OF THE SECRETARY OF WAR TO SETTLE
CONTRACTS AND OVER CLAIMS, DOUBTS AND DISPUTES ARISING
OUT OF WAR DEPARTMENT CONTRACTS,
WHETHER DURING PERFORMANCE OR
UPON SUSPENSION OR TERMINATION.

Under § 3744 of the U. S. Revised Statutes, contracts must be in writing and signed at the end by both parties. This provision is in the nature of a Statute of Frauds and is for the protection of the United States only.¹ Failure to comply with it will not, therefore, prevent the United States from enforcing the contract. The effect of it is, however, immediately to divide War Department contracts into two classes, those executed in compliance with the statute, called formal, and those not so executed, called informal. With the former are to be classified those contracts which are expressly excepted from the Act. These are generally all contracts to be performed within sixty days or involving payment of less than \$500 as a total consideration.² The distinction is further emphasized by the principle that any agreement is invalid, unless it be to the interest

¹ *United States v. New York & Porto Rico Steamship Co.*, 239 U. S. 88.

² Comp. Stat. '16, §§ 6853a, 6853b, 6853c, 6854.

of the United States to make it. It would seem, therefore, that the Secretary of War could not by a supplemental agreement cure the informality of the contract. The contract was already enforceable against the contractor and it would not be to the interest of the United States to give him rights to enforce it against the government unless he gave something more in return. For the same reason the Secretary of War could not settle any claims of a contractor or make any payments to him under such a contract, whether under the express terms of the contract or otherwise. The only rights of the contractor would seem to be to recover on a *quantum meruit* for property or services actually delivered to and accepted by the United States. Such implied contracts, it would seem, are not shut off by § 3744 of the U. S. Revised Statutes.³ In order to remedy this disability which applied to great numbers of war contracts, the Act of March 2, 1919, hereafter discussed, was passed.

(a) *Formal contracts executed in accordance with § 3744 of the Revised Statutes and otherwise.*

The power of the Secretary of War and heads of other Departments to make contracts required for the exercise and performance of their duties arises by necessary implication, and is confirmed by statute; and it is held that this power to contract necessarily carries with it the power to amend by supplemental contract and to terminate by agreement in like manner.⁴ Furthermore, this involves power in the Secretary of War to cover in such agreement of settlement a complete adjustment of all claims, including unliquidated damages that may have arisen during the performance of the contract.⁵ It will be noted, however, that this power of the Secretary of War to settle formal contracts by agreement with the contractor rests wholly upon the existence of the contract itself, and cannot be exercised where the contract has been fully executed by performance, or terminated by breach. In such cases the powers and functions of the Secretary of War to amend the contract have ceased, and

³ United States v. Andrews & Co., 207 U. S. 229.

⁴ United States v. Corliss Steam-Engine Co., 91 U. S. 321.

⁵ W. O. Burton Claim v. United States, 15 Comp. Dec. 439; and opinion of the Comptroller of November 25th, 1918, paragraph 9.

the claims of the parties are merely for damages for some breach of the contract and can only be determined by a court having jurisdiction.

The power of the Secretary of War to contract is necessarily delegated to the Chiefs of the Bureaus of the War Department, and by them in turn to certain officers and perhaps civilians selected by them. Without such delegation the functions of the War Department could not be performed. Such delegations are usually by order in writing, but may be by mere oral appointment. The power to make supplemental contracts altering the terms of, or terminating, the original contract is also ordinarily delegated to the chiefs of bureaus and officers acting under them. Such contracts may not only curtail or terminate production, but may also finally dispose of all questions, including those of unliquidated damages, which have arisen under the original contract.

In all such supplemental or settlement agreements whether for the complete termination of the contract or for curtailment, the provisions of the contract itself fix the maximum amount to be paid to the contractor, which amount the contracting officer should not exceed, unless by reason of unliquidated damages or of some valid modification of the contract itself. Otherwise the settlement would not be in the interests of the United States. So it is commonly said that the United States cannot settle for more than that which it would have had to pay to complete the contract, and only in rare cases can a settlement be justified, where the amount paid to the contractor equals or exceeds the prospective cost to the United States for the additional completed articles, less the additional prospective cost to the manufacturer in manufacturing the articles. Most War Department contracts have termination clauses permitting the Secretary of War to terminate the contract and setting forth the basis for computing the amount to be paid the contractor. The settlement would not be in the interest of the United States, and the settlement contract would be void, if the amount exceeded what might be fixed under the method agreed to in the termination clause of the original contract. This rule is also subject to the above exceptions as to changes pursuant to the terms of

the contract, thus increasing the cost; and an additional amount is to be paid by the United States as unliquidated damages, as for breach of warranty, or for failure to deliver raw material or components at the times specified, or for some other cause. Many contracts have so-called change of specification clauses. These permit the War Department to change the specifications and provide that the compensation to the contractor will be modified accordingly. Under such circumstances the changes need not be made in writing under § 3744 of the U. S. Revised Statutes, but may be made informally, as they are acts done in the execution of the terms of a contract and are not the making of a new contract.

(b) *Informal and implied contracts.*

As above stated, the Secretary of War had no jurisdiction to settle questions arising under such contracts, and might only pay for property and services actually received and accepted. The pressure and necessities of the war had, however, caused the making of great numbers of such contracts, and this number was increased by the ruling of the Comptroller of the Treasury that contracts signed by proxy were not executed in accordance with the provisions of § 3744 of the U. S. Revised Statutes.⁶ These contracts signed by proxy had been drawn in the name of some contracting officer whose name also appeared in the signature for the United States, but the contract was in fact signed by another officer who added his own name to the signature. Great numbers of these contracts were suspended shortly after the Armistice. And as the contractors learned that the United States could not reimburse them for their costs, unfinished work, materials, unabsorbed amortization of equipment and machinery, etc., they brought the matter to the attention of Congress, which, after consideration of a number of proposed bills, passed the Act of March 2, 1919, sometimes called the Dent Act. This Act authorizes the Secretary of War, under certain limitations, to "adjust, pay or discharge" such agreements, whether expressed or implied, "upon a fair and equitable basis." Under this Act, the Secretary of War exercises, in some respects, a wider jurisdiction in the adjustment

⁶ Opinion of the Comptroller of November 25th, 1918.

of contracts not properly executed that in the case of contracts which have been executed in accordance with the terms of the statutes. For example, he may make adjustments of such improperly executed contracts whether the same have been completed in whole or in part, and might therefore adjust a question of unliquidated damages on an informal contract which had been entirely completed. Further, his jurisdiction is extended to the adjustment of contracts, not executed in the manner prescribed by law, made by other agencies of the Government acting under the authority of the President. On the other hand, claims must be filed before June 30, 1919. The original agreement must have been made before November 12, 1918, and expenditures must have been made, or obligations incurred on the faith of it before that date. Prospective or anticipated profits may not be allowed but "A reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform" may be given. The word "remuneration" is construed to have a much wider meaning than reimbursement and to include compensation. There is also a clause charging the Secretary of War with especial responsibility with regard to claims of subcontractors under such settlements. None of these limitations, however, apply where the contract is one with a foreign government or a citizen thereof, except that the contract must have been made before November 12th.

It would seem also that this Act permits settlements on a wide basis under implied contract. It purports to cover "any agreement, express or implied * * * that has been entered into in good faith * * * and has not been executed in the manner prescribed by law." It would seem that under it the Secretary of War may, on the determination that a Compulsory Order, purporting to be issued under § 120 of the National Defense Act of June 3rd, 1916, was not properly issued, settle the various elements of expense, unabsorbed amortization, etc., in like manner as in case of informal express contract. This is because the invalid compulsory order has required production by the claimant like a contract, and thus has similar elements of costs and expense arising out of prepara-

tion to perform, etc., and gives rise to an implied contract, because the United States has by its proper officer and under authority of law induced the contractor to do all these things and has received the benefit therefrom.

It will be seen that where contracts have been executed in the manner prescribed by law, this jurisdiction of the Secretary of War depends entirely upon his right to make supplemental or amending contracts. It does not, therefore, trespass at all on the jurisdiction of the Courts. The Secretary of War has to determine what financial arrangements he will make, and what disposition of property he will make in his supplemental contract of settlement; and if he makes this determination by applying rules of law and by using semi-judicial methods, that will not make his act a judicial one nor an infringement of the functions of the Courts. And for the same reason the making of these determinations by him are not in conflict with § 368 of the Compiled Statutes of 1916 which reads as follows:

“All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.”

The settlements of the Secretary of War under the Act of March 2, 1919, are administrative acts within his express authority under that statute, and are not an exercise of judicial power, or in conflict with § 368 of the Compiled Statutes of 1916 above quoted.

Col. Jennings C. Wise.

WAR DEPARTMENT, WASHINGTON, D. C.